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The World Trade Organization between law and politics: negotiating a solution for public stockholding for food security purposes

Matias E Margulis
Lecturer in Political Economy, School of Social and Political Science
University of Edinburgh
Chrystal Macmillan Building, 15a George Square
Edinburgh EH8 9LD
m.e.margulis@stir.ac.uk

Abstract

This article examines efforts by member states of the World Trade Organization (WTO) to modify international trade laws to further accommodate public food stockholding for food security programmes operated by developing countries. While WTO members have negotiated a temporary Peace Clause to minimise the threat of a trade dispute for countries whose public food stockholding violates their international trade commitments, negotiations to modify existing WTO law have been fraught with political discord. I argue that states are using the WTO's negotiating function to address perceived conflicts between international trade law and national food security goals rather than pursuing a solution through legal adjudication. The case of public food stockholding reveals important dynamics about the WTO-food security relationship that are overlooked by approaches primarily concerned with supra-national constraints on national policy and the fragmentation of international law.

Keywords

World Trade Organization (WTO); Agreement on Agriculture; public food stockholding; food security; human right to food.

Introduction

This article examines recent efforts by the member states of the World Trade Organization (WTO) to modify international trade laws to ensure compatibility with the public food stockholding. In response to rising levels of hunger and increased volatility of world food prices, many states in Asia and Africa have established or expanded public food stockholding – which involves governments purchasing, stockpiling and distributing essential food staples such as rice and wheat – as a form of self-insurance to support domestic food security. While the number of developing countries turning to public food stockholding has increased, it has simultaneously become one of the most contested trade policy issues at the WTO. Developed and developing countries disagree on the extent to which WTO rules should be modified to reduce the risk that some developing countries, such as India, will violate international trade rules in the pursuit of public food stockholding.

WTO members have been negotiating with the goal to end a situation of legal uncertainty surrounding public food stockholding. States agreed to a Peace Clause in 2013 in which they temporarily waived the right to launch disputes against countries whose public food stockholding programmes led them violate WTO rules on agricultural subsidy spending. Yet the Peace Clause is only considered a stop gap by WTO members and the larger goal is to arrive at a so-called “permanent solution” that would result in the rewriting of existing trade rules to ensure that all public food stockholding programmes are WTO compliant. Yet negotiations for a permanent solution have been fraught by political discord. WTO members missed a series of self-imposed deadlines in 2015 and 2017 to deliver a permanent solution because of political deadlock among developing and developed countries. As a result, the situation that currently exists is one where governments that are currently operating, seeking to expand or planning new public stockholding programmes continue to face legal uncertainty about the consistency of their programmes with the law of the WTO. The lack of

legal clarity surrounding public food stockholding at the WTO has been cited as problematic by the former United Nations (UN) Special Rapporteur on the right to food because of the “chilling effect” uncertainty may have on states’ efforts to improve food security.¹ Similar situations of legal uncertainty at the WTO, for example, have been shown to lead states to pursue less ambitious environmental protection policies because of the perceived risks of violating trade rules.² Therefore, there is a palpable concern that legal uncertainty at the WTO may discourage states from enacting new food security policies or convincing them to pursue less ambitious goals in food security terms than they would have otherwise.

The existing literature on public food stockholding at the WTO has been primarily concerned with the potential conflicts between international and domestic legal regimes³ yet has overlooked the role of inter-state bargaining in seeking to accommodate national food security goals at the WTO. In this article, I argue that states have turned to politics rather than law to address legal uncertainty about public food stockholding. By this I mean that states have chosen ‘politics’ by pursuing a consensus-based solution that involves working through the WTO’s negotiation function. This process is shaped by bargaining and accommodation among states with homogenous preferences and power capabilities. I distinguish this from a solution pursued through ‘law’, which would involve states turning to adjudication via a supra-national, national court or other delegated agent that is empowered to decide and instruct states on the appropriate relationship between their international trade obligations and

¹ Olivier De Schutter, *The World Trade Organization and the Post-Global Food Crisis Agenda: Putting Food Security First in the International Trade System*, 2011).

² Robyn Eckersley, 'The Big Chill: The WTO and multilateral environmental agreements' (2004) 4 *Global Environmental Politics* 24; Ken Conca, 'The WTO and the undermining of global environmental governance' (2000) 7 *Review of International Political Economy* 484.

³ Carlos Correa, *Subsidies and food security at WTO: A permanent solution is still pending*, 2014); Katie Sykes, 'What Constitutes Legitimate Policy Space for Food Security?' in Daniel Drache and Lesley A. Jacobs (eds), *Grey Zones in International Economic Law and Global Governance: Crises and Resilience* (Grey Zones in International Economic Law and Global Governance: Crises and Resilience, UBC Press 2018); James J. Nedumpara, 'India's Food Security Concerns and the WTO Bali Ministerial Decision' (2014) 9 *Global Trade and Customs Journal* 177; Sannoy Das, 'Food Security Amendments to the WTO Green Box: A Critical Re-Examination' (2016) 50 *Journal of World Trade* 1111.

national policy goals.⁴ I contend that the turn to politics by states in the case of public food stockholding is crucial to understanding the evolving WTO-food security relationship. In particular, the politics of public food stockholding suggest that the challenge identified by states is not one about addressing conflicts among or between international and domestic legal regimes, but instead is one of accommodating a shifting balance of power among states and the new status of global food security as an international consensus goal.

The WTO and food security relationship

The relationship between the WTO and food security is a topic of significant debate among scholars (not only of International Law but also of Economics, Political Science and Development Studies), policymakers, practitioners and civil society organizations.⁵ Put in its simplest form, at the heart of this debate is whether agricultural trade liberalization supports or undermines food security. There is no consensus to this debate. This debate not only applies to the 1995 *Agreement on Agriculture* (AoA), which sets the rules for international food trade, but also extends to the WTO's *Agreement on Sanitary and Phytosanitary Measures* (SPS) and *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS), the latter which is associated with the closure of a public commons for seed saving

⁴ I recognize that the distinction between politics and law is not always straightforward and that they are constitutive of one another. It is through politics that states design and establish international legal orders and institutions. The practice of international law-making and its implementation over time routinely leads to outcomes that collide with the preferences of states, thus subsequently generating new politics.

⁵ Jim Greenfield, Maurizio de Nigris and Panos Konandreas, 'The Uruguay Round Agreement on Agriculture: Food Security Implications for Developing Countries' (1999) 21 Food Policy 365; FAO, *Experience with the Implementation of the Uruguay Round Agreement on Agriculture*, 2001; Carmen G Gonzalez, 'Institutionalizing inequality: The WTO agreement on agriculture, food security, and developing countries' (2002) 27 Columbia Journal of Environmental Law 433; FAO, *Trade and Food Security: Conceptualizing the Linkages* (FAO 2003); Eugenio Diaz-Bonilla, Marcelle Thomas and Sherman Robinson, 'Trade, food security and WTO negotiations: Some reflections on boxes and their content' (2003) Agricultural Trade and Poverty: Making Policy Analysis Count 59; Peter M. Rosset, *Food is Different* (Fernwood Publishing 2006); Jennifer Clapp, 'WTO agriculture negotiations: implications for the Global South' (2006) 27 Third World Quarterly 563; Thomas Harmon (ed), *Trade Reforms and Food Security: Country Case Studies and Synthesis* (FAO 2007); Gerardo Otero, Gabriela Pechlaner and Efe Can Gürcan, 'The Political Economy of "Food Security" and Trade: Uneven and Combined Dependency' (2013) 78 Rural Sociology 263; Matias E Margulis, 'The regime complex for food security: implications for the global hunger challenge' (2013) 19 Global Governance: A Review of Multilateralism and International Organizations 53.

and distribution. In this section I consider how critical legal scholarship has conceptualized the WTO-food security relationship. Given the short nature of this article, I provide a stylized overview of these perspectives, which I label under two broad labels: supra-national constraints on national policy; and, the fragmentation of international law.

Supra-national constraints on national policy

One way to conceptualize the WTO-food security is to consider the constraints imposed by WTO law on the policies pursued by states. The WTO is widely recognized as one of the most powerful international legal regimes wherein states take binding commitments to liberalize their trade policies over time, and with commitments enforced by a dispute settlement system.

Supra-national constraints on food security may exist because of the binding nature of WTO law. Market outcomes resulting from binding international trade rules on agriculture are often identified as an important mechanism through which the WTO influences food security. Take the case of agricultural tariff liberalisation. Under the AoA, all WTO members were required to convert all non-trade barriers into tariffs, and bind and reduce all agricultural tariffs over a period of time.⁶ A prominent critique of agricultural tariff reduction under the AoA is that it was highly unbalanced with the rules written in a way that favoured major agricultural exporting countries and leading to greater food import dependency among developing countries as lower tariffs led to cheaper food imports and simultaneously dis-

⁶ This included an average tariff reduction of 36% over six years for developed countries and an average reduction of 24% over 10 years for developing countries. Least developed countries (LDCs) were not required to make reductions.

incentivising domestic food production.⁷ Seen from this perspective, WTO rules can be understood to lock-in policy reforms that may have negative consequences for food security.⁸

WTO rules may also constrain states' ability to pursue food security by limiting their options to respond to unfavourable market conditions. Recall that a key goal of the AoA is to reduce state intervention in agricultural markets and trade. Trade rules have become increasingly about regulating domestic policy and thus the scope for state intervention. One issue that has received a lot of attention is whether developing countries have the right to temporarily raise tariffs beyond the bound levels in their WTO commitments in response to import surges.⁹ Import surges – such as occur when local markets experience the dumping of cheap, subsidized agricultural products from abroad – have significant, long-term destabilizing effects on domestic food production by threatening the livelihoods of small-scale farmers in poor developing countries. Small-scale farmers produce most of the food in developing countries, yet they lack the financial and institutional resources (including government support) to cope with cheap imports and the ensuing economic hardship compared to farmers in developed countries.¹⁰ Raising tariffs to increase the price of imports is a standard policy tool utilized by states concerned about the effects of cheap imports on

⁷ OHCHR, *Globalization and Its Impact on the Full Enjoyment of Human Rights: Report of the High Commissioner for Human Rights Submitted in Accordance with Commission on Human Rights Resolution 2001/32*, 2002); J. Michael Finger and Julio J. Nogués, 'The Unbalanced Uruguay Round Outcome: The New Areas in Future WTO Negotiations' (2002) 25 *World Economy* 321; Clapp, 'WTO agriculture negotiations: implications for the Global South'; Olivier De Schutter, *Mission to the World Trade Organization*, 2009); Jennifer Clapp, 'Food security and contested agricultural trade norms' (2015) 11 *Journal of International Law and International Relations* 104.

⁸ Anne Orford, 'Food security, free trade, and the battle for the state' (2015) 11 *Journal of International Law and International Relations* 1

⁹ Gonzalez, 'Institutionalizing inequality: The WTO agreement on agriculture, food security, and developing countries':476-480; Orford, 'Food security, free trade, and the battle for the state'.

¹⁰ Kevin Watkins and Joachim Von Braun, 'Time to stop dumping on the world's poor' (2003) IFPRI Annual Report, 2002-2003 ; Chris Downes, 'Must the Losers of Free Trade Go Hungry-Reconciling WTO Obligations and the Right to Food' (2006) 47 *Va J Int'l L* 619:635-636; Carmen G. Gonzalez, 'International Economic Law and the Right to Food' in Nadia C. S. Lambek and others (eds), *Rethinking Food Systems: Structural Challenges, New Strategies and the Law* (Rethinking Food Systems: Structural Challenges, New Strategies and the Law, Springer Netherlands 2014); Sarah Joseph, *Blame it on the WTO?: A Human Rights Critique* (Oxford University Press 2011). Developing countries have attempted to correct this situation by negotiating for a Special Safeguard Mechanism (SSM), which would permit them to raise tariffs to protect food security and rural livelihoods. While WTO members agree in principle to the legitimacy of the SSM as a policy tool for developing countries, the collapse of the Doha Round negotiations have left the SSM in a state of limbo.

domestic producers. However, under current WTO rules most developing countries do not have the right to unilaterally increase agricultural tariffs beyond bound levels during an import surge. This is sharp contrast with developed countries that have recourse to a Special Agricultural Safeguard under the AoA, which grants them the right to unilaterally apply tariff rates above bound levels during an import surge.¹¹ This asymmetry in the rules of the AoA in case of import surges constrains developing countries' capacity to protect their food security. This is an illustration of what Carmen Gonzalez has dubbed the "institutionalized inequality" of the AoA.¹²

The fragmentation of international law

The WTO-food security relationship is also approached from the fragmentation of international law perspective. The international legal system is said to be fragmented because disparate bodies of international law evolve in isolation from one another and, in doing so, produce norm and treaty conflicts.¹³ WTO law is particularly associated as a major driver of fragmentation of the international legal system at the expense of general, overarching systems of international public law.¹⁴ The WTO's liberal trade bias if often argued to be in conflict with the norms and rules of other international legal regimes.¹⁵ Under these conditions, states may face legal uncertainty on how to reconcile apparently contradictory international norms

¹¹ The full list of states with the right to implement Special Agricultural Safeguards is available here: https://www.wto.org/english/tratop_e/agric_e/guide_agric_safeg_e.htm

¹² Gonzalez, 'Institutionalizing inequality: The WTO agreement on agriculture, food security, and developing countries':476-480; Orford, 'Food security, free trade, and the battle for the state'.

¹³ Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 European Journal of International Law 483; Anja Lindroos and Michael Mehling, 'Dispelling the Chimera of 'Self-Contained Regimes' International Law and the WTO' (2005) 16 European Journal of International Law 857.

¹⁴ Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 American Journal of International Law 535; Mcej Bronckers, 'More power to the WTO?' (2001) 4 Journal of International Economic Law 41.

¹⁵ Erich Vranes, 'The Definition of 'Norm Conflict' in International Law and Legal Theory' (2006) 17 European Journal of International Law 395; Christine Kaufmann and Simone Heri, 'Liberalizing Trade in Agriculture and Food Security-Mission Impossible' (2007) 40 Vand J Transnat'l L 1039. See also Andrew Lang, 'Twenty years of the WTO Appellate Body's "fragmentation jurisprudence"' (2015) 14 Journal of International Trade Law and Policy 116.

and treaty obligations.¹⁶ In the case of food security, fragmentation of international law is characterised by concerns about norm and treaty conflicts between WTO law and states' obligations under other international treaties, especially those that apply to relevant to economic and social rights such as food, health and development.¹⁷

One of the significant norm conflicts that arise in the WTO-food security relations is about competing interpretations about the role of the state and its responsibility to intervene in the market to achieve food security. The WTO's goal is to open national agricultural markets to international competition, which inevitably produces winners and losers. In poor developing countries, such losers may be small-scale farmers who lose their livelihoods and experience an increase in their vulnerability to food insecurity.¹⁸ This outcome is not considered inherently problematic at the WTO based on the system's logic that economic dislocation is inevitable and outweighed by the net global welfare gains accrued from free trade. The WTO's economistic value system stands in sharp contrast to that of the international human right system with its norm that states should take progressive measures to respect, protect and fulfil human rights such as the right to food. In other words, states have a duty to prevent outcomes that impair the enjoyment of human rights. Indeed, states are expected to take affirmative actions to remedy the situation of the losers if these are vulnerable groups such as resource-poor farmers and labourers.¹⁹ The competing

¹⁶ Vranes, 'The Definition of 'Norm Conflict' in International Law and Legal Theory'; Joost Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) 14 *European Journal of International Law* 907; G. Kristen Rosendal, 'Impacts of Overlapping International Regimes: The case of Biodiversity' (2001) 7 *Global Governance* 95; Margulis, 'The regime complex for food security: implications for the global hunger challenge'.

¹⁷ Rhonda Ferguson, *The Right to Food and the World Trade Organization's Rules on Agriculture: Conflicting, Compatible, or Complementary?* (Brill Nijhoff 2018); James Harrison, *The Human Rights Impact of the World Trade Organisation* (Hart Publishing 2007); Joseph, *Blame it on the WTO?: A Human Rights Critique*.

¹⁸ Harrison, *The Human Rights Impact of the World Trade Organisation*; Joseph, *Blame it on the WTO?: A Human Rights Critique*.

¹⁹ Kaufmann and Heri, 'Liberalizing Trade in Agriculture and Food Security-Mission Impossible'; OHCHR, *Globalization and Its Impact on the Full Enjoyment of Human Rights: Report of the High Commissioner for Human Rights Submitted in Accordance with Commission on Human Rights Resolution 2001/32:13-15*.

understandings from a trade and human rights approach was identified by the UN High Commissioner for Human Rights (OHCHR) as thus:

Human rights law concerns itself in particular with the situation of the individuals and groups who might suffer during the reform process. Indeed, this is one of the key issues concerning globalization and human rights. Even where the net social benefit from trade liberalization favours the majority in a certain country, the principle of non-discrimination under human rights law requires immediate action to protect the human rights of those who do not benefit. In the case of the AoA, this means that States should use existing flexibilities in the Agreement where they exist, and WTO members should consider improving or adding flexibilities where appropriate.²⁰

While WTO law does not *prevent* states from potentially compensating losers facing increased food security, the international human rights regime *requires* that states take proactive steps to compensate losers if their human right to food has been materially diminished. These competing interpretations about the role of states manifests sharply in national and international legal debates about how and when states should pursue agricultural trade liberalization and the extent of their responsibilities to avert and/or mitigate negative consequences for food insecure populations.²¹

In addition to legal interpretation about potential conflicts between WTO rules and the international human rights obligations of states, a more practical concern about the fragmentation of international law is how it influences the behaviour of states in trade negotiations. According to the former UN Special Rapporteur on the right to food, Olivier De Schutter, the fragmentation of international law makes it complex and difficult for states

²⁰ OHCHR, *Globalization and Its Impact on the Full Enjoyment of Human Rights: Report of the High Commissioner for Human Rights Submitted in Accordance with Commission on Human Rights Resolution 2001/32:13-15.*

²¹ Kaufmann and Heri, 'Liberalizing Trade in Agriculture and Food Security-Mission Impossible': 1056.

to coordinate their international human rights obligations and trade commitments. The lack of coordination results in a situation where “trade negotiators either are not aware of the human rights obligations of the Governments they represent, or they do not identify the implications for their position in trade negotiations”.²² When states behave incoherently in the international arena in this way they disregard their obligations to protect, respect and fulfil the human right to food when entering into multilateral trade negotiations. Such a situation leads states to treat trade commitments “as equivalent in normative force” to existing human rights obligations, which De Schutter has argued to be erroneous on the basis that human rights obligations “have the status of peremptory norms of international law” and should thus “should prevail over any other international commitments”.²³

International legal scholars and the UN human rights system have advanced multiple solutions to address potential norm and treaty conflicts between international agriculture trade agreements and achieving food security. This includes that states: incorporate the human right to food in their trade policy positions, including undertaking *ex ante* human rights impact assessments; evaluate the consistency of trade agreements with states’ human rights obligations; seek further legal clarification from international human rights bodies, and; explore the use of exceptions and sunset clauses.²⁴ Others emphasize the need for trade negotiations to seek normative guidance from international legal documents such as the Committee on Economic Social Rights’ *General Comment No. 12 on the Right to Food* or the

²² De Schutter, *Mission to the World Trade Organization*:16.

²³ Ibid:16.

²⁴ OHCHR, *Globalization and Its Impact on the Full Enjoyment of Human Rights: Report of the High Commissioner for Human Rights Submitted in Accordance with Commission on Human Rights Resolution 2001/32*; Harrison, *The Human Rights Impact of the World Trade Organisation*; Olivier De Schutter, *A human rights approach to trade and investment policies* (Paper prepared for conference, Confronting the global food challenge: finding new approaches to trade and investment that support the right to food, held on 24-26 November 2008, 2008); De Schutter, *Mission to the World Trade Organization*; OHCHR, *Human Rights and the World Trade Agreements: Using general exception clauses to protect human rights* (OHCHR 2005); Vranes, ‘The Definition of ‘Norm Conflict’ in International Law and Legal Theory’; Joseph, *Blame it on the WTO?: A Human Rights Critique*; Ferguson, *The Right to Food and the World Trade Organization's Rules on Agriculture: Conflicting, Compatible, or Complementary?*.

UN Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security.²⁵ Lastly, there is optimism that

“harmonization through interpretation” may resolve norm and treaty conflicts between the AoA and the human right to food through adjudication in reference to the Vienna Convention on the Law of Treaties.²⁶

What is public food stockholding?

Public food stockholding refers to state-managed programmes of purchasing, storing and distributing of agricultural commodities. Sometimes referred to as public food reserves or domestic food aid, public food stockholding is used by governments to achieve a mix of policy goals, including stabilizing domestic food prices and supplies, providing subsidized food to targeted populations, and supporting rural livelihoods.

Establishing public stockholding in developing countries was one of the major objectives of the post-war international food regime.²⁷ It is not just developing countries that have experimented with public food stockholding; until recently the US operated the Food Security Wheat Reserve for “guaranteeing a supply of wheat in times of tight supplies or unanticipated need”.²⁸ Yet public food stockholding as a policy idea went out of favour in the 1980s and 1990s under structural adjustment policies and due to shifts in ideological currents

²⁵ Sven Söller, 'The “Breakthrough” of the right to food: The meaning of general comment no. 12 and the voluntary guidelines for the interpretation of the human right to food' (2007) 11 *Max Planck Yearbook of United Nations Law* 391

²⁶ Kerstin Mechlem, 'Harmonizing trade in agriculture and human rights: options for the integration of the right to food into the agreement on agriculture', *Max Planck Yearbook of United Nations Law*, vol 10 (Max Planck Yearbook of United Nations Law, 2006); De Schutter, *A human rights approach to trade and investment policies*.

²⁷ The idea to establish an international food reserves was proposed in 1946 by Sir John Boyd Orr, the first Director-General of the Food and Agriculture Organization of the United Nations. This plan for a 'World Food Board' was ultimately rejected by the United States and Great Britain. See Amy L. S. Staples, 'To Win the Peace: The Food and Agriculture Organization, Sir John Boyd Orr, and the World Food Board Proposals' (2003) 28 *Peace & Change* 495.

²⁸ Charles E. Hanrahan, *The Bill Emerson Humanitarian Trust: Background and Current Issues*, (2003).

that saw policymakers favour freer trade and the private sector to coordinate world food supply and prices.²⁹

Interest in public food stockholding was revived during the 2007-2008 Global Food Crisis. Spurred by a combination of national biofuel mandates, financial speculation in agricultural commodities, high oil prices and unilateral export restrictions, the Global Food Crisis was characterized by skyrocketing prices for staple food grains such as rice and wheat, increasing the number of hungry people worldwide to over one billion and precipitating food riots across much of the developing world.³⁰ The crisis prompted governments – especially those states with high levels of food insecurity and vulnerable to external shocks – to rethink their policies for food security, including putting an increased emphasis on domestic food production.³¹ In this context, dozens of governments in Asia, Africa and the Middle East announced or expressed interest in public food stockholding.³² The most significant

²⁹ Sophia Murphy, *Strategic Grain Reserves In an Era of Volatility*, 2009): 7-8; Jennifer Clapp, 'Food self-sufficiency: Making sense of it, and when it makes sense' (2017) 66 Food Policy 88; Matias E. Margulis, 'The Forgotten History of Food Security in the Multilateral Trading System' (2017) 16 World Trade Review 25; Carsten Daugbjerg, Arild Aurvåg Farsund and Oluf Langhelle, 'The resilience of paradigm mixes: food security in a post-exceptionalist trade regime' (2017) 24 Journal of European Public Policy 1698; Clapp, 'Food self-sufficiency: Making sense of it, and when it makes sense'.

³⁰ Derek Headey and Shenggen Fan, 'Anatomy of a Crisis: The Causes and Consequences of Surging Food Prices' (2008) 39 Agricultural Economics 375; Jennifer Clapp, 'Food Price Volatility and Vulnerability in the Global South: Considering the Global Economic Context' (2009) 30 Third World Quarterly 1183; Matias Margulis, 'Multilateral Responses to the Global Food Crisis' (2009) 4 CAB Reviews: Perspectives in Agriculture, Veterinary Science, Nutrition and Natural Resources 1; Margulis, 'The regime complex for food security: implications for the global hunger challenge'; Pedro Conceição and Ronald U. Mendoza, 'Anatomy of the Global Food Crisis' (2009) 30 Third World Quarterly 1159; Philip McMichael, 'A Food Regime Analysis of the World Food Crisis' (2009) 26 Agriculture and Human Values 281; Lucy Jarosz, 'Energy, Climate Change, Meat, and Markets: Mapping the Coordinates of the Current World Food Crisis' (2009) 3 Geography Compass 2065; Timothy Lang, 'Crisis? What Crisis? The Normality of the Current Food Crisis' (2010) 10 Journal of Agrarian Change 87;

³¹ Eve Fouilleux, Nicolas Bricas and Arlène Alpha, 'Feeding 9 billion people': global food security debates and the productionist trap' (2017) 24 Journal of European Public Policy 1658. Renewed interest in public food stockholding is not just at the national scale. In 2012 Japan, China, South Korea and other Asian nations established the Association of Southeast Asian Nations (ASEAN) Plus Three Emergency Rice Reserve to enhance food security in the region. The Economic Community of West African States (ECOWAS) agreed in 2013 to establish a regional food security reserve to promote a regional response to future food crises. This regional reserve became operational in 2017 following its first delivery of cereals to address a food crisis in the north-eastern Nigeria. Public food stockholding has also been the subject of global-level debates at the Group of Twenty (G-20), a club of advanced industrial and emerging economies, United Nations Conference of Trade and Development (UNCTAD) and the High Level Panel of Experts on Food Security and Nutrition in the context of identifying global solutions to address food price volatility.

³² Murphy, *Strategic Grain Reserves In an Era of Volatility*; Brian Wright and Carlo Cafiero, 'Grain reserves and food security in the Middle East and North Africa' (2011) 3 Food Security 61; Mulat Demeke and others,

programme was launched by the Indian government in 2013 when it passed the *National Food Security Act*. The Act entitles two-thirds of its national population of 1.3 billion people to 5 kilograms of staple grains per person per month at a low subsidized price.³³ Other countries, such as Kenya and Malawi, significantly expanded the size of existing stockholding programmes (in some cases doubling) in response to the crisis. In Rwanda the government re-introduced public food stockholding.³⁴

Political discord over public food stockholding at the WTO

While the number of states introducing or expanding public food stockholding has grown in recent years, the question of the legality of such programmes under the law of the WTO has come under scrutiny. In 2013, the US, EU, Canada and Australia, argued that countries operating public food stockholding programmes, such as India, were close to exceeding their WTO-mandated levels of government spending on agricultural subsidies.³⁵ The US, EU, Canada and Australia, all of which are major agricultural exporters, view food stockholding programmes as disguised protectionism and undermining the goal of the WTO to advance trade liberalization. Agricultural exporters fear public food stockholding will lead to lost commercial opportunities as developing countries encourage domestic food production at the expense of imports. In addition to their commercial interests, many developed countries are concerned that public food stockholding policies are indicative of a pendulum shift towards

Food and agriculture policy decisions: Trends, emerging issues and policy alignments since the 2007/08 food security crisis, 2014); Matias E. Margulis, 'A new grey zone in global trade governance? Recent developments on food security at the WTO' in Daniel Drache and Lesley A. Jacobs (eds), *Grey Zones in International Economic Law and Global Governance: Crises and Resilience* (Grey Zones in International Economic Law and Global Governance: Crises and Resilience, UBC Press forthcoming); Sophia Murphy, 'Food security and international trade: Risk, trust and rules' (2015) 2 Canadian Food Studies/La Revue canadienne des études sur l'alimentation 88.

³³ Department of Food and Public Distribution. <http://dfpd.nic.in/Salient-features-National-Food-Security-Act.htm> Accessed 7 February 2017.

³⁴ Demeke and others, *Food and agriculture policy decisions: Trends, emerging issues and policy alignments since the 2007/08 food security crisis*: 75.

³⁵ WTO, 'Farm produce stockholding worries members who fear impact on trade and incomes' 2013) <https://www.wto.org/english/news_e/news13_e/agcom_26sep13_e.htm> accessed 7 February

food self-sufficiency in developing countries, which they regard as incompatible with the norm of free trade.³⁶

The controversy unfolding over public food stockholding at the WTO is a complex one and it is difficult to address all the nuances in the space available here. My main contention is that to view events at the WTO as evidence of supra-national constraints on national food security policies or a conflict between international legal regimes is to miss the intricacies of important shifts in the politics of the WTO-food security relationship.

Firstly, recent developments on public food stockholding should not be conflated as a debate about supra-national constraints on national policy. This is because public stockholding for food security purposes *is permitted* under the rules of the AoA.³⁷ There is nothing to prevent states from operating public food stockholding. The only ‘constraint’ on public food stockholding programmes is that they meet the WTO’s criteria of not distorting agricultural trade or effect production. Article 3 in Annex 2 of the AoA specifies that in order to meet this condition, the costs of running public food stockholding should be identified in national legislation and that stocks correspond to predetermined food security targets. The AoA also requires that government purchases of food stuffs “be made at current market prices and sales from food security stocks shall be made at no less than the current domestic market price for the product and quality in question”.³⁸ The AoA permits states to provide subsidized food to “eligible recipients” such as the poor at market or at subsidized prices as long as government purchases of foodstuffs be “made at current market prices and the financing and administration of the aid shall be transparent.”³⁹ As long as programmes meet

³⁶ Murphy, 'Food security and international trade: Risk, trust and rules'; Clapp, 'Food self-sufficiency: Making sense of it, and when it makes sense'.

³⁷ Article 1, Annex 2 of the *Agreement on Agriculture*.

³⁸ Article 3, Annex 2 of the *Agreement on Agriculture*.

³⁹ Article 1, Annex 2 of the *Agreement on Agriculture*.

the conditions specified in the AoA, there is no limit on the size and scope of public stockholding for food security purposes.⁴⁰

What then is the disagreement over public food stockholding at the WTO all about? The disagreement among developed and developing countries largely revolves around the issue of whether existing rules in the AoA are sufficiently flexible, or need to be rewritten, to accommodate the recent expansion of public stockholding by developing countries, especially India's massive programme under its *National Food Security*. One key source of tension is that some countries, such as India, argue that the current requirement in the AoA to purchase agricultural commodities at market prices is especially problematic for the running of their public food stockholding programmes. Many governments *wish to intentionally purchase food stuffs at fixed prices rather than market prices* (known as administered prices), for example, when a policy goal is to incentivise domestic food production. Purchases at administered prices above market prices guarantees farmers a fair price for their crops and thus a predictable income, thereby reducing the inherent risks of agricultural production and encouraging farmers to plant more crops than they would have otherwise and to make other production-related investments.

Government purchases of agricultural commodities at administered prices is a long-established practice, and while the market efficiency and potential for market distortions of this practice is a subject to scholarly debate⁴¹, the relevant point for this article is that doing so puts some developing countries at risk of violating their international trade commitments on agricultural subsidy spending. The architecture of the AoA is built around the core

⁴⁰ Melaku Desta, *The law of international trade in agricultural products: from GATT 1947 to the WTO Agreement on Agriculture* (Kluwer Law International 2002);

⁴¹ Christopher L. Gilbert, 'International agreements to manage food price volatility' (2012) 1 *Global Food Security* 134; Franck Galtier, 'Managing food price instability: Critical assessment of the dominant doctrine' (2013) 2 *Global Food Security* 72; C. Peter Timmer, 'Food Security in Asia and the Pacific: The Rapidly Changing Role of Rice' (2014) 1 *Asia & the Pacific Policy Studies* 73; Francesco Laio, Luca Ridolfi and Paolo D'Odorico, 'The past and future of food stocks' (2016) 11 *Environmental Research Letters* 035010

objective of discouraging states from using policies that may distort patterns of international trade and production. This includes curbing government spending on agricultural subsidies.⁴²

Each WTO member state has a specified, legally-binding annual limit on the value and volume of agricultural subsidies it may provide that is specified in the AoA. While most developed countries successfully negotiated relatively high agricultural subsidy spending limits under the AoA during the Uruguay Round (1986-1994) of GATT negotiations, most developing countries negotiated for very low levels of spending on such subsidies. This fundamental asymmetry in the AoA is a product of history. In the late 1980s, when governments were negotiating their WTO limits on agricultural subsidy spending, most developing countries were facing severe economic difficulties and retrenching public spending on agriculture as part of structural adjustment policies. Given the severity of their fiscal challenges at the time, most developing countries did not envisage they would be in a future position to significantly increase spending on agriculture and thus did not negotiate for higher subsidy spending limits. However, as developing countries have implemented public stockholding to achieve food security in recent years, many states now find themselves at risk of exceeding their permissible levels on agricultural subsidy spending at the WTO.⁴³ This situation matters because WTO rules are “hard” ones: if governments exceed their agricultural subsidy spending limits, they may be deemed to be in violation of WTO rules and thus be vulnerable to trade sanctions carrying significant economic costs.⁴⁴ This situation is

⁴² The AoA defines different categories of agricultural subsidies and constrains their use in relation to the distorting effects on trade and production. This includes “Green box” subsidies that are understood to have no or minimally-trade distorting effects and that may be provided without any spending limits. “Blue box” subsidies have some trade-distorting effects but do not affect production that are permitted but subject to spending limits. “Amber box” subsidies are considered to distort production and trade and therefore subject to strict spending limits.

⁴³ Author, forthcoming.

⁴⁴ John H. Barton and others, *The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO* (Princeton University Press 2010).

not a hypothetical one: a recent study of developing country WTO members found that India, Turkey, the Philippines and Egypt are exceeding their agricultural subsidy limits.⁴⁵

Developing countries operating public food stockholding programmes have acknowledged that they are potentially at risk of exceeding their agricultural subsidy limits and thus violating WTO law. However, they argue that the problem lies not with their programmes, which they maintain are legitimate policies to achieve national food security, but instead with existing WTO law.⁴⁶ Following this line of argumentation, the Group of 33 (G-33), a bargaining coalition of thirty-plus developing countries led by India and including China, has been driving efforts to renegotiate WTO law to make it more compatible with contemporary public food stockholding practices.⁴⁷ The G-33's attempts to change WTO law has been fraught with political discord. The 2013 WTO Ministerial meeting in Bali, Indonesia – where public food stockholding was the top issue on the agenda for trade ministers – nearly collapsed due to disagreement between developed and developing countries on how to further accommodate public food stockholding under WTO law. Only an eleventh-hour US-India compromise, which required an extraordinary meeting between President Obama and Prime Minister Modi after India threatened to veto a new WTO agreement on trade facilitation if there was no progress on food stockholding, led to a temporary Peace Clause. Under the temporary Peace Clause, WTO member states agreed not to initiate legal challenges against a country if its spending on public stockholding exceeds its agricultural subsidy limits.

⁴⁵ Panos Konandreas and George Mermigkas, *WTO domestic support disciplines: Options for alleviating constraints to stockholding in developing countries in the follow-up to Bali* (Paper prepared for the FAO Expert Meeting on Stocks, Markets and Stability, FAO Rome, 30-31 January 2014, 2014)

⁴⁶ Das, 'Food Security Amendments to the WTO Green Box: A Critical Re-Examination' De Schutter, *The World Trade Organization and the Post-Global Food Crisis Agenda: Putting Food Security First in the International Trade System*; South Centre, *Subsidies and food security in WTO: A permanent solution is still pending* (Analytical Note, 2014); Christian Häberli, *After Bali: WTO rules applying to public food reserves* (FAO Commodity and Trade Policy Research Working Paper, 2014).

⁴⁷ The G-33 currently includes 48 developing country members.

Although the Peace Clause addresses the threat of an immediate trade dispute, WTO member states committed themselves to negotiate a ‘permanent solution’ to ensure the consistency of public food stockholding with WTO law.⁴⁸ The G-33 has advanced several proposals to achieve a permanent solution. The G-33 at one point proposed a “technical” fix that would revise the methodology for calculating the level of agricultural subsidy spending with respect to public food stockholding in the AoA. Developing countries have argued since the early 2000s that the current formula to calculate agricultural subsidies, which requires governments to calculate the subsidy element by using reference prices from 1986-1988 (when international food prices were low) and that does not adequately factor in inflation, results in exaggerated reported levels of agricultural subsidy spending by developing countries. The G-33 has argued that a technical fix would result in a more accurate measurement of the level of spending on agricultural subsidies. If this alternative methodology was to be adopted by WTO members, it is claimed that it would result in far lower reported figures of spending on agricultural subsidies by developing countries. This new methodology would thus have the effect of ensuring countries such as India would not be in breach of their binding subsidy limits under the AoA because of spending on public food stockholding. While this technical fix has wide support among WTO members, the G-33 was unable to translate this into agreement because the US was unwilling to make a bespoke change to the AoA without further trade concessions from developing countries on agriculture reform.

States failed to agree on a permanent solution at the Nairobi Ministerial meeting in 2015. Since that meeting, developed and developing countries’ positions on public food stockholding have grown further apart. In response, the G-33 changed its bargaining

⁴⁸ Rorden Wilkinson, Erin N. Hannah and James Scott, 'The WTO in Nairobi: The demise of the Doha Development Agenda and the future of the multilateral trading system' (2016) 7 Global Policy 247.

approach. While it continues to advocate for the technical fix, the G-33 put forward a more radical proposal in 2017 calling for all government spending on public stockholding for food security purposes – regardless if made at market or administered prices – to be treated as non-trade distort support and thus exempt from counting towards a country’s agricultural subsidy spending limits.⁴⁹ This proposal is regarded as a more radical approach as it seeks a blanket exemption for developing countries from existing WTO agricultural subsidy spending commitments on the grounds of food security. Not surprisingly, the G-33 proposal has proved to be highly controversial and rejected by developed countries, whom regard the idea of reclassifying spending on public food stockholding, in particular purchases at administered prices, as non-trade distorting as an unacceptable change to the AoA. Developed and developing countries remain deadlocked over public food stockholding. This was illustrated recently at the last WTO Ministerial meeting in December 2017 in Buenos Aires, at which India blamed the US for blocking talks on public food stockholding.

Repeated failures and the lack of forward progress in the negotiations demonstrates the difficulty in reaching a permanent solution for public food stockholding at the WTO. Public food stockholding remains a major source of political friction and the question of its legality under WTO trade rules remain a significant, unresolved problem in global trade politics. Never the less, states have not called time on the negotiations and continue to negotiate towards a permanent solution.

Concluding thoughts: from law to politics

States have thus far negotiated a partial solution to address concerns about the legal uncertainty surrounding public food stockholding at the WTO. States reached agreement on a

⁴⁹ WTO, 2017. New proposals in agriculture talks form “tangible steps” forward.
https://www.wto.org/english/news_e/news17_e/agng_19jul17_e.htm

Peace Clause to ensure no developing country is subject to a trade dispute for exceeding agricultural subsidy spending limits but have yet to agree on how to rewrite existing WTO rules to address the concerns of countries such as India, who wish to purchase and sell foodstuffs for stockholding at administered prices without exceeding agricultural subsidy spending limits. While legitimate concerns remain about the long-term chilling effect caused by legal uncertainty at the WTO over public food stockholding, the fact that states have chosen to engage in political bargaining rather than legal adjudication illustrates important and changing dynamics in the WTO-food security relationship.

The politics of public food stockholding at the WTO does not fit with a narrative of supra-national constraints on the food security policies of developing countries. WTO rules do not prevent developing countries from pursuing public food stockholding. This policy is entirely permissible in the AoA. There are also no asymmetries in the rules in this case as exists in the case of import surges. Existing WTO law, which has been in place since 1995, did not stop developing countries from pursuing public food stockholding after the 2007-2008 Global Food Crisis. A real concern with the WTO law arose only when it became apparent that a small number of developing countries but especially India, which is a powerful player at the WTO, were close to exceeding their agricultural subsidy limits. Therefore, I contend that the politics of public stockholding are thus not about supra-national constraints on national policy space per se but instead about the problems faced by a small number of developing countries at risk of violating their WTO subsidy commitments. The solution requires states agreeing to either modify how agricultural subsidies are calculated and/or permit certain developing countries such as India to increase their agricultural subsidy spending limits. This will involve more bargaining and compromise among developed and developing countries to find a consensus solution.

The long-standing argument that WTO rules constrain the food security policies of developing countries is premised on the experience of developing countries during the GATT Uruguay Round negotiations. Many regard the AoA to have principally benefitted the interests of major agricultural exporting countries such as the US, EU, Canada and Australia while having imposed major costs on the developing world. Yet a major change is evident in the politics on public food stockholding at the WTO in that it has taken place during a transformative shift in the global balance of power among states. At present emerging powers such as Brazil, India and China are powerful players in the trade regime and shaping the agenda and rules of the WTO.⁵⁰ Developing countries working together in the G-33 have been successful in making public food stockholding a key issue in the WTO negotiations and keeping it at the top of the agenda. New powers are also exerting their influence in the negotiations. Recall that the two key players in the political battle over public stockholding have been between India, an emerging power, and the United States, an established power. These changing power dynamics at the WTO suggest a shift towards a more polycentric regime. The changing balance of power is important because it suggests that the interests of developing countries, including food security, are much less likely be ridden roughshod by developed countries like in the past.

From a distance, the involvement by actors such as the UN Special Rapporteur on the right to food and global civil society on the margins of the negotiations on public food stockholding might suggest that there is an inherent conflict between international trade law and the human right to food. Yet no state has invoked the need to respect international human rights treaties or obligations to justify or strengthen their bargaining position in the

⁵⁰ Kristen Hopewell, *Breaking the WTO: How Emerging Powers Disrupted the Neoliberal Project* (Stanford University Press 2016); Kristen Hopewell, 'Different paths to power: The rise of Brazil, India and China at the World Trade Organization' (2015) 22 *Review of International Political Economy* 311; Charalampos Efstathiopoulos, 'Leadership in the WTO: Brazil, India and the Doha development agenda' (2012) 25 *Cambridge Review of International Affairs* 269; Amrita Narlikar, 'New powers in the club: the challenges of global trade governance' (2010) 86 *International Affairs* 717.

negotiations, even when they could have done so⁵¹. Nor have developing countries entertained the option of forum-shifting the negotiations on public food stockholding to another supra-national institution that would be favourable to claims about the potential conflict between trade liberalization the right to food such as the UN Committee for World Food Security, UN Human Rights Council or the International Court of Justice. While states may disagree on how best to modify WTO law in relation to public food stockholding, the current consensus among them appears to be one that this is a matter to be resolved exclusively through political bargaining at the WTO.

The politics of public food stockholding have yielded a significant outcome. Despite a lack of a permanent solution, the agreement on the Peace Clause is notable and significant. It represents a tacit acceptance by WTO member states that legitimate food security objectives are grounds to deviate from binding international trade commitments. Recall that the Peace Clause makes non-actionable a violation of agricultural subsidy spending limits caused by spending on public food stockholding. This marks a break with how states have previously treated the provisions in the AoA. The main purpose of the AoA is to cap agricultural subsidy spending by states and enforce these commitments through the WTO's dispute settlement mechanism. The flexibility demonstrated by states to waive certain obligations under the AoA on food security grounds illustrate that politics can make WTO rules more malleable than often appreciated. Therefore it is not helpful to conceive of WTO law as "constitutional" like that of other international legal regimes, where it is very difficult and complex to change the context of treaties, for example, such as international human rights agreements.⁵² The nature of WTO agreements, with their built-in agendas of continual negotiation, means that the substantive contents of multilateral trade agreements are potentially highly changeable

⁵¹ In the past Nordic states have evoked the human right to food in defence of certain agricultural policies in the negotiations.

⁵² Jeffrey L. Dunoff, 'Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law' (2006) 17 *European Journal of International Law* 647.

over time. States have frequently deviated from WTO rules on food policy grounds in the past when it suited their interests.⁵³ The negotiations on public food stockholding follows this pattern of permissive deviation from the rules, however, this time the changes have been driven by developing countries rather than developed countries than has been traditionally the case.

A second contingent factor reshaping the WTO-food security relationship are developments in global and national food policy environments have resulted in a greater permeability of the WTO to food security issues than has been previously thought possible. Unlike the era in which the AoA was negotiated when states were primarily seeking to retrench support to the agricultural sector, the present context is one where many developing countries, increasingly supported by international institutions and new political projects such as the Sustainable Development Goals (SDGs), are scaling up national policies and investment to support food security. Compared to the era of the Washington Consensus, the current international environment is where one food security has the status of a global consensus goal. The current international environment significantly contributes to legitimating actions in the name of food security by states and non-state actors. This makes the WTO as an institution relatively more receptive to food security concerns compared to when the AoA was originally negotiated. This partly explains why developing countries' concerns about public food stockholding have dominated and remained on the WTO agenda in recent years. Alongside the changing balance of power and greater role of developing countries in shaping the agenda and rules of the WTO, these developments portend an era of potentially improved coherence between international trade and food security goals.

⁵³ Daugbjerg, Farsund and Langhelle, 'The resilience of paradigm mixes: food security in a post-exceptionalist trade regime'.

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Declaration of interest statement

None

Author bio

Matias E. Margulis is Lecturer in Political Economy at the University of Edinburgh. His research examines the nexus of global governance, trade and food security. His work has been published in *Review of International Political Economy*, *Global Governance*, *World Trade Review*, *Globalizations* and *Geopolitics*. He is the editor of *The Global Political Economy of Raúl Prebisch* and co-editor of *Land Grabbing and Global Governance*.